No. 2719.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Before Judges GILBERT, ROSS and MORROW.

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,

v.

CORNELIUS C. WATTS, *et al.*,
Appellees.

BRIEF OF APPELLANTS AND APPELLEES BOULDINS.

JOSEPH W. BAILEY,
WELDON M. BAILEY,
Attorneys for Bouldins.

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BRIEF ON THE APPLICATIONS FOR A REHEARING.

On behalf of the Bouldin appellants and appellees we submit this brief on the applications for rehearing filed by Joseph E. Wise and Lucia J. Wise and the Santa Cruz Development Company.

The Petition of the Santa Cruz Development Company.

The Santa Cruz Development Company has filed a petition for a rehearing or for the certification of the

questions in this case to the United States Supreme Court. The chief reason that they advance in support of their request for the certification of the questions to the Supreme Court is that it will expedite the cause for the reason that the Supreme Court will "*undoubtedly*" review the decree of this Court on certiorari or appeal. That statement well indicates the whole tenor of their petition for a rehearing. In the first place, it is certain that the Supreme Court will not review this case on appeal, for the reason that there is no appealable question in it; and, in the second place, it is almost as certain that the Supreme Court will not review it upon a Writ of Certiorari, for the reason that the Writs of Certiorari are few and far between, and that there is no question whatever in this case upon which any one might reasonably suppose that the Supreme Court will grant such a writ.

The request that this Court certify the questions in this case to the Supreme Court is absurd. The Circuit Court of Appeals cannot certify an entire case to the Supreme Court.

Quinlan v. *Green County,* 205 U. S., 410.
John v. *The Folmina,* 212 U. S., 354.
Chicago B. & Q. Ry. Co. v. *Williams,* 214 U. S., 492.
Cross v. *Evans,* 167 U. S., 60.

Furthermore no request for such a certificate can be made after the decision of the Circuit Court of Appeals. The purpose of the provision of the Judicial Code allow-

ing certificates to the Supreme Court is to aid the Circuit Court of Appeals in its decision of the case. It must be asked for before the decision and cannot be made to serve as an appeal.

On the second page of this petition the attorney for the Santa Cruz Development Company quotes an expression from a brief filed in the case of *Lane* v. *Watts*. When that case first came to trial it was agreed by all the plaintiffs that they would join in the suit against the Secretary and the Commissioner, and that none of them would attempt to gain any advantage over the others in that suit. Mr. Brevillier, the attorney for the Santa Cruz Development Company, filed a brief in the Supreme Court of the United States which contained the following paragraph:

"Alleged Title of Appellees Davis and C. C. Watts.

"The appellees, C. C. Watts, and D. C. T. Davis, Jr., claim under an instrument which is either an attempted assignment of mortgage or a power of attorney (Printed Record, p. 332), made to them 'as trustees,' by the surviving trustee and the heirs and legal representatives of a deceased joint trustee, named in a mortgage (Printed Record, p. 337), made by Arizona Copper Estate (of land in a civil law state) to Alex F. Mathews and S. A. M. Syme, who were in fact trustees, as will appear by the language of the mortgage; and S. A. M. Syme, the other joint trustee is still living (Printed Record, p. 334). Mathews and Syme had title to the invalid amended

location of 1866 (Printed Record, pp. 325 to 332), under a chain of deeds, beginning with the assignment by John S. Watts to Christopher E. Hawley in 1870 (Printed Record, p. 332), which purported to transfer by *quit claim deed* the interest of the grantor, John S. Watts, by metes and bounds in that one of the three separate locations of Baca Float No. 3, known as the attempted amended location of 1866. If there was any right to make such amended location, it passed to John S. Watts as one of the incidents or appurtenances of the deed of May 1, 1864, of the 1863 location; and the mere reference to that deed in the Hawley instrument as the *source of title* cannot overrule the specific description in the instrument of land in which the grantor had some interest in 1870, and which the successors in title of Hawley continued to assert to be the true location until the Secretary decided in 1899 (Printed Record, p. 209) that the attempted amended location of 1866 was void *ab initio.*"

This paragraph was construed by the other counsel in the case as an attack upon the title of the successful parties in this case, and an attempt to get the Supreme Court of the United States to express some opinion as to which set of claimants had the better title, and consequently as a violation of the agreement that none of them would attempt to gain an advantage over the other in that suit. The supplemental brief in which the quotation on page 2 appears was then filed in order to negative that action on the part of counsel for the Santa Cruz

Development Company. That was its only purpose and it had no bearing whatever on this case.

Santa Cruz Development Company asks a rehearing on four grounds. First, that the opinion of this Court is based upon an obvious misreading of *Lane* v. *Watts;* second, that this Court misconstrued the Prentice Cases; third, that this Court had no right in law or in fact to make any use of the Wrightson title bond; fourth, that even under the *falsa demonstratio* rule the Hawley deed conveyed and was intended to convey only the 1866 location. His argument in support of these propositions contains nothing new. It was all included in his original brief, and was fully answered in the briefs which were filed at the argument. The Court has disposed of all his contentions in its opinion, and we will not consume the time of the Court in discussing them further.

Permit us to say, however, that we were of counsel in the case of *Lane* v. *Watts* and are familiar with the record and opinion in that case. We here and now state, also with "the utmost positiveness" that this Court did not "misread" *Lane* v. *Watts*. Permit us also to say that "for four years we have been studying the questions involved herein" and that "the years of study we have given the Prentice cases warrant us" in asserting with "the utmost positiveness" that this Court did not "misread" them.

We cannot conclude the discussion of this petition without calling the Court's attention to pages 21 and 22 thereof. Many of the statements contained on those pages are as purely surmise and conjecture as can well

be imagined, and though they are of no importance, they are absolutely without support in the Record. Mr. Brevillier constantly insists that Hawley "wanted mineral land." How he knows that, and what possible effect it can have on this case, we do not know.

The Petition of Joseph E. and Lucia J. Wise.

Adverse Possession:

The petition of the Wises is based entirely upon the question of adverse possession. Their counsel contends that this Court did not pass on that question, despite the fact that he assigned it as error, that it was argued at length in the briefs, and despite the Court's statement on the last page of their opinion that—

> "The other points made by counsel have been carefully considered, but we do not think they require special mention."

Furthermore, this contention is made directly in the face of the fact that the lower court specifically decreed that no adverse possession could be initiated by any of the parties to the suit prior to December 14, 1914, and this Court affirmed that decree without any alteration of that paragraph.

But even at the risk of uselessly repeating our former arguments, we take the liberty of adding something to what we have already said on the question of adverse possession.

(1) *The land in controversy was segregated from the public domain on or about December* 14, 1914.

We do not think that this statement will admit of serious question. The decree of the Supreme Court of the United States, in the case of *Lane* v. *Watts*, ordered (Record, p. 411) the Secretary of the Interior and the Commissioner of the General Land Office to place the Contzen Survey on file "for the purpose of defining the outboundaries of said lands and segregating the same from the public lands of the United States." It will be seen that the Court ordered this survey placed on file for a certain *purpose,* namely, to define the outboundaries of the land and to segregate it from the public domain. Consequently it can not be contended that the land had been segregated, or the outboundaries thereof defined, before that survey was placed on file in accordance with the decree.

The plaintiffs' "Exhibit R" (Record, p. 193) is a certified copy of a letter from the Assistant Commissioner to the Secretary of the Interior, dated December 14, 1914, stating that in compliance with the letter of December 2, 1914, the Contzen Survey, with the accompanying field notes, had been filed and transmitted to the local land office. Thus, the decree of the Court was executed, the outboundaries of the land defined, and the land was segregated from the public domain.

(2) *No adverse possession could be maintained by any party to this suit prior to the time the land was segregated from the public domain.*

Until the land in controversy was segregated from the public domain the grant claimants had no definite means of ascertaining the extent of their possessions and were without right to relief in ejectment; and until such a right to relief in ejectment was given them, no person could claim any rights by adverse possession against them.

The Supreme Court of the United States said in their opinion in the case of *Lane* v. *Watts* that they agreed with the lower courts that a survey was necessary to segregate this land from the public domain. They cited the case of *Stoneroad* v. *Stoneroad*, 158 U. S., 240. That case involved the Preston Beck Grant, also confirmed by the Act of June 21, 1860. The plaintiff brought a suit in ejectment against the defendant involving land which was outside the limit of the grant as surveyed by the United States, but inside the limit of the designated boundaries of the grant under which the plaintiff claimed; that is, it was inside the limit of the boundaries as they were described in the grant to the claimant by the King of Spain. The Supreme Court held that the survey was conclusive evidence of the location of the grant, and that plaintiff could not maintain an action of ejectment for any land not included in the survey, even though it was included within the boundaries of the original grant. They say, on page 247:

> "We think the confirmatory act of 1860, by necessary implication, contemplated that the confirmed grant should be thereafter surveyed, and that such survey was essentiial for the purpose of definitely

segregating the land, to which the right was confirmed, from the public domain, and thus finally fixing the extent of the rights of the owners of the grant. To hold otherwise would be to conclude that Congress had confirmed the claim and yet deprived the claimant of all definite means of ascertaining the extent of his possessions under the confirmed title."

On page 251 they say:

"As we have seen, a survey was necessary. Now, if the survey was illegal, and is to be treated as not existing, then we are without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant. In other words, *if it be conceded that there is no survey, the plaintiff is without right to relief,* since a survey was essential to carry out the confirmatory act."

We think that case conclusive here. Paraphrasing the language of that opinion, until Baca Float No. 3 was segregated from the public domain the grant claimants had no means of ascertaining the extent of their possessions under the confirmed title, *and were without right to relief in ejectment,* since the survey was necessary to carry out the confirmatory act of June 21, 1860.

A few practical observations as to the reason for the rules above laid down may not be amiss. Until the survey, in such cases as these, is placed on file the grant

claimant has no muniment of his title. He is in the position of a man who owns land, but has no deed and no way of showing that he does own it. The decree in *Lane* v. *Watts* also required the Commissioner and Secretary of the Interior to place the Contzen Survey on file "as muniment of the title which passed to the heirs of said Baca." The Contzen Survey, approved and filed, is the muniment fo the title of the grant claimants.

Until land is segregated from the public domain there can be no means of proving whether any particular parcel of land is within or without the limits of the grant. In the event that the grant claimants bring an action of ejectment, the defendant can answer and make them prove that the land which he claims is within the limits of their grant. Without a survey and consequent segregation, the plaintiff would be "without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant," and consequently the action must fail.

Conclusion.

Since the commencement of this case more than forty thousand dollars in taxes has been assessed against this land. These taxes we must pay, though we have not had the use or enjoyment of the land during that period. There are many squatters on the land who are committing the grossest kinds of waste. They are cutting down trees and misusing the land in every possible way. We cannot well dispose of them until this case is ended.

In the interests of justice we, the owners of the land, earnestly ask the Court to put an end to this litigation. For fifty years the Government kept the true owners out of possession. Our present opponents have pursued us for years with what we consider to be nothing more than a mere "nuisance" title. They have cost us a fortune and they now seek to prolong this contest still further.

We have read the brief submitted on behalf of Messrs. Watts and Davis, therefore will not further elaborate this brief.

For the reasons given in this brief, we respectfully pray the Court not to grant a rehearing in this case, or to certify any of the questions in the case to the Supreme Court of the United States.

Respectfully submitted,

JOSEPH W. BAILEY,
WELDON M. BAILEY,
Counsel for Bouldin
Appellants and Appellees.